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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 18

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, LOCAL 283, PETITIONER

v.

RUSSELL SCOFIELD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 53

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 133, UAW, AFL-CIO, PETITIONER

v.

THE FAFNIR BEARING COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The court of appeals rendered no opinion in No. 18. The opinion of the court of appeals in No. 53 (R.-53, 16-22)[1] is unreported. The underlying Board decisions and orders in the two cases are reported at 145 NLRB 1097 and 146 NLRB 1582, respectively.

JURISDICTION

No. 18: The order of the court of appeals denying intervention was entered on September 16, 1964 (R.-18, 8), and a petition for reconsideration was denied on October 6, 1964 (R.-18, 15). The petition for a writ of certiorari was filed on November 4, 1964, and was granted on January 18, 1965 (R.-18, 16; 379 U.S. 959). The Court has jurisdiction under 28 U.S.C. 1254(1).

No. 53: The order of the court of appeals denying intervention was entered on December 24, 1964 (R.-53, 22). The petition for a writ of certiorari was filed on February 5, 1965, and granted on March 29, 1965 (R.-53, 23; 380 U.S. 950).[2] The Court has jurisdiction under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. The question presented in No. 18 is whether, where the National Labor Relations Board has dis-

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[1] The record in No. 18 will be designated "R-18," and that in No. 53, "R.-53."

[2] The Court set the case for oral argument immediately following No. 18.

missed an unfair labor practice complaint and the party who filed the charges that led to the complaint petitions the court of appeals to review the dismissal action, the respondent before the Board should be permitted to intervene as a party in the review proceeding.

2. The question presented in No. 53 is whether, where the Board has issued an unfair labor practice order against the respondent and he petitions the court of appeals to review that order, the successful charging party should be permitted to intervene as a party in the review proceeding.[3]

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in Appendix A (pp. 38-43, *infra*).

STATEMENT

A. The proceedings in No. 18

Upon charges filed by certain employees of the Wisconsin Motor Company, the General Counsel of the Board issued a complaint against Local 283 of the United Automobile Workers. The complaint alleged that the Union had violated Section 8(b)(1)(A) of the Act by fining its members for exceeding produc-

[3] A similar question is presented in *International Union of Electrical Workers* v. *National Labor Relations Board and General Electric Co.*, No. 87, this Term, pending on petition for certiorari.

tion ceilings established by a union rule and by bringing civil suits for the collection of such fines. After a hearing, the trial examiner concluded that the imposition and collection of the fines did not violate Section 8(b)(1)(A) and recommended that the complaint be dismissed. The Board (one Member dissenting) sustained the trial examiner and entered an order of dismissal. 145 NLRB 1097.

Pursuant to Section 10(f) of the Act, the charging parties filed a petition to review the Board's order in the Court of Appeals for the Seventh Circuit (R.-18, 1-4). The Board filed an answer urging that the petition be denied (R.-18, 4-5). Local 283, the successful respondent before the Board, filed a motion, to which both the Board and the charging parties consented, to intervene in the review proceeding (R.-18, 6-7). A single judge of the court of appeals denied the motion to intervene, and authorized the Union to file a brief as *amicus curiae* but not to participate in the oral argument (R.-18, 8). The Union petitioned for reconsideration by the court *en banc* or by a division thereof (R.-18, 9-14). A division of the court denied the petition (R.-18, 15).

B. The proceedings in No. 53

Upon charges filed by Local 133 of the United Automobile Workers, the General Counsel of the Board issued a complaint against The Fafnir Bearing Company. The complaint alleged that the Company had violated Sections 8(a)(1) and (5) of the Act by refusing to permit the Union to conduct independent time studies on jobs involved in grievances

that had arisen under the parties' collective bargaining agreement. After a hearing, the trial examiner concluded that the Company had not committed an unfair labor practice and recommended that the complaint be dismissed. The Board (with one Member dissenting) reversed the trial examiner and held that the Company had violated the Act as alleged in the complaint. The Board entered an order requiring the Company to cease and desist from the unfair labor practice found and to permit the Union, upon request, to perform its own time study on the jobs involved in the grievances in issue. 146 NLRB 1582.

Pursuant to Section 10(f) of the Act, the Company filed in the Court of Appeals for the Second Circuit a petition to review the Board's order against it (R.-53, 1-6). The Board, pursuant to Section 10(e), filed a cross-petition for enforcement (R.-53, 7-8). The Union, the successful charging party, moved to intervene in the proceeding (R.-53, 9-12). Both the Board and the Company opposed the motion (R.-53, 13-14, 15). The court of appeals denied the Union's motion to intervene, but authorized it to file a brief as *amicus curiae* (R.-53, 16-22).

SUMMARY OF ARGUMENT

Sections 10(e) and (f) of the National Labor Relations Act, which govern judicial review of orders issued by the Labor Board under the Act, provide that the Board and "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought" are parties to the judicial

review proceeding. If the order of the Board dismisses the complaint or denies adequate remedial relief, the person who filed the unfair labor practice charge with the Board [4] is deemed aggrieved; if the Board enters a remedial order, the respondent in the Board proceeding is aggrieved. The statute is silent with respect to participation in judicial review proceedings by persons not aggrieved, and the question presented by these two cases is whether and in what circumstances persons directly affected but not aggrieved by Board orders—the charging party, if the Board grants adequate relief (No. 53), and the respondent, if the Board orders the complaint dismissed (No. 18)—should be permitted to intervene and participate as parties in the judicial review proceeding. No statute or rule of procedure answers this question. This Court, in the exercise of its supervisory authority over the procedures of the federal courts, can, drawing on the basic policy and objectives of the National Labor Relations Act, formulate a sound, workable and fair rule governing such intervention.

The basic thrust of the Act is to establish an administrative agency for the prevention of labor practices that are unfair and harmful to the public, rather than to vindicate or protect purely private rights or interests. The decision whether to institute a proceeding under the Act is exclusively the Board's;

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[4] Under the Act, an unfair labor practice proceeding is initiated by the General Counsel of the Board on the basis of a charge filed by a member of the public (irrespective of the nature of his interest in the matter). Such a person is known as the "charging party".

the charging party can neither institute such a proceeding himself nor compel the Board to do so. The General Counsel of the Board has exclusive authority to define the issues in the proceeding and both he and the Board may settle the case without the consent of the charging party. If the Board finds a violation and issues a remedial order, it has exclusive authority to decide whether to seek court enforcement or accept informal compliance with its order, and whether to prosecute violations of a court enforcement decree. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261. Under the statutory scheme, then, exclusive responsibility for administering the Act is vested in the Board, and so the propriety of intervention in any stage of an unfair labor practice proceeding by a person not entitled by the statute to participate as a "person aggrieved" should depend on how such intervention would affect the exercise of that responsibility.

Judged by this standard, intervention by a successful charging party should be denied, but intervention by a successful respondent should be granted. In the former case, the result of permitting intervention would be that a private person—the charging party—could block a settlement of the case that the Board deemed in the public interest, or petition for certiorari despite the Board's belief that further proceedings would not be in the public interest. Neither of these substantial dangers to the integrity of the statutory pattern is presented by intervention of a successful respondent. He, unlike a successful charging

party, is not the incidental beneficiary of a Board order issued to prevent a labor practice that is unfair and injurious to the public, but the person against whom the Board is seeking to impose a sanction. He could in no event be prevented from seeking review in this Court of a subsequent court decision upholding a Board order against him; nor could the case be compromised without his consent.

We urge this Court to formulate a rule permitting the successful respondent before the Board, but not the successful charging party, to intervene in Labor Board review proceedings. We do not argue that the same rule would be appropriate in the case of other government agencies operating under different statutory schemes. The question of the scope of intervention in judicial review proceedings should, in the absence of explicit statutory provision, be determined with reference to the particular purposes, objectives, and practical problems of each agency, which, of course, vary considerably.

ARGUMENT

I

No Statutory Provision or Rule of Procedure Confers on the Successful Charging Party or Successful Respondent a Right to Intervene in Court of Appeals Proceedings to Review Labor Board Orders

The judicial review provisions of the National Labor Relations Act do not provide for the participation of a private beneficiary of the Board's order. Section 10(e) empowers the Board to petition the appropriate court of appeals for enforcement of orders en-

tered by it and provides that "the court shall cause notice" of the filing of the petition "to be served upon" the person charged with the unfair labor practice (*i.e.*, the respondent before the Board). Similarly the companion review provision, Section 10(f), provides for the filing of a petition by "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought," and adds that "[a] copy of such petition shall be forthwith transmitted by the clerk of the court to the Board." These sections contemplate two parties to court of appeals proceedings—the Board and the person aggrieved by the Board's order. Where the Board finds an unfair labor practice, the person aggrieved is the respondent before the Board; where the Board dismisses an unfair labor practice complaint, the person aggrieved is the charging party before the Board.[5] The Act makes no provision for joinder or intervention of any other person.[6]

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[5] See *Albrecht* v. *National Labor Relations Board*, 181 F. 2d 652, 653-655 (C.A. 7); *Jacobsen* v. *National Labor Relations Board*, 120 F. 2d 96, 100 (C.A. 3).

[6] Accordingly, when someone other than the Board has been joined as a party-defendant to a petition to review, Board motions to strike that party have uniformly been granted. See, *e.g.*, *Cafero* v. *National Labor Relations Board*, 336 F. 2d 115 (C.A. 2) (unreported order granting motion to strike employer and union); *American Newspaper Publishers Ass'n* v. *National Labor Relations Board*, 190 F. 2d 45, 48-49 (C.A. 7); *Piasecki Aircraft Corp.* v. *National Labor Relations Board*, 280 F. 2d 575 (C.A. 3) (unreported order); *Galina* v. *National Labor Relations Board*, 55 LRRM 2170 (C.A. 9); *Amalgamated Meat Cutters* v. *National Labor Relations Board*, No. 18,278 (C.A. D.C.) (unreported order).

The rules of the courts of appeals are silent on when intervention will be allowed in the absence of express statutory authorization; they provide simply that "[a] person desiring to intervene in a case where the applicable statute does not provide for intervention shall file with the court and serve upon all parties a motion for leave to intervene" (C.A. 2, Rule 13(f); C.A. 7, Rule 14(f); see R-53, 18). Rule 24(a)(2) of the Federal Rules of Civil Procedure permits intervention as of right in an action "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." But the Federal Rules, which govern district court proceedings, are not applicable to the courts of appeals; and since very different considerations may apply with respect to the propriety of intervention in court of appeals as against district court proceedings, Rule 24(a)(2) has only limited bearing, even as an analogy, on the present problem. Moreover, even in district court cases, it has been recognized that the provisions of Rule 24, "[o]bviously tailored to fit ordinary civil litigation, * * * require other than literal application in atypical cases. Administrative cases * * * often vary from the norm." *Textile Workers Union* v. *Allendale Co.*, 226 F.2d 765, 767 (C.A. D.C.), certiorari denied, 351 U.S. 909. *A fortiori*, Rule 24 should not be deemed controlling in court of appeals proceedings to review administrative action.

II

The Design and Objectives of the National Labor Relations Act and Considerations of Procedural Fairness, Economy, and Convenience Support a Distinction Between the Successful Respondent, Who Should be Permitted to Intervene in Judicial Review Proceedings, and the Successful Charging Party, Who Should Not

Since no statute or rule explicitly creates a right of intervention in the circumstances involved in these cases, whether such right exists depends upon the general scheme and purposes of the National Labor Relations Act, considered in light of basic principles of procedural fairness, economy, and convenience. In the case of the successful respondent, it has been the general practice of the courts of appeals, including the Seventh Circuit, to permit intervention.[7] The

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[7] See, *e.g.*, *Kovach* v. *National Labor Relations Board*, 229 F. 2d 138 (C.A. 7); *Albrecht* v. *National Labor Relations Board*, 181 F. 2d 652 (C.A. 7); *American Newspaper Publishers Ass'n* v. *National Labor Relations Board*, 190 F. 2d 45, 48-49 (C.A. 7); *Amalgamated Clothing Workers* v. *National Labor Relations Board*, 324 F. 2d 228 (C.A. 2); *Industrial Union of Marine & Shipbuilding Workers* v. *National Labor Relations Board*, 320 F. 2d 615 (C.A. 3); *Selby-Battersby & Co.* v. *National Labor Relations Board*, 259 F. 2d 151 (C.A. 4); *Darlington Mfg. Co.* v. *National Labor Relations Board*, 325 F. 2d 682 (C.A. 4); *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 236 F. 2d 898 (C.A. 6); *Minnesota Milk Co.* v. *National Labor Relations Board*, 314 F. 2d 761 (C.A. 8); *Great Western Broadcasting Corp.* v. *National Labor Relations Board*, 310 F. 2d 591 (C.A. 9); *Local 1441, Retail Clerks* v. *National Labor Relations Board*, 326 F. 2d 663 (C.A. D.C.); *Teamsters Local 79* v. *National Labor Relations Board*, 325 F. 2d 1011 (C.A. D.C.). See also *Dargel* v. *Henderson*, 199 F. 2d 270 (Emerg. Ct. of App.). But see *Amalgamated Meat Cutters* v. *National Labor Relations Board*, 267 F. 2d 169 (C.A. 1), certiorari de-

Seventh Circuit's decision in No. 18, denying intervention, is thus aberrational. In the case of the successful charging party, the courts' practice has been to deny intervention, as the Second Circuit did in No. 53; every court that has discussed the question has agreed with the Second Circuit's position.[8] We show

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nied, 361 U.S. 863; *Haleston Drug Stores* v. *National Labor Relations Board*, 140 F. 2d 1022 (C.A. 9).

The Second Circuit, in No. 53, while denying intervention to the successful charging party, recognized that the situation of the successful respondent was different. The court stated (R.-53, 19, n. 1):

> * * * the right of a respondent who has been wholly or partially successful before the Board, to intervene on a petition by the charging party to reverse or modify the Board's order, presents a problem wholly different from that here considered. Such intervention seems to have been regularly allowed, and there would appear to be no doubt as to its propriety.

[8] *Aluminum Ore Co.* v. *National Labor Relations Board*, 131 F. 2d 485, 488 (C.A. 7). And see *Stewart Die Casting Corp.* v. *National Labor Relations Board*, 132 F. 2d 801 (C.A. 7); *National Labor Relations Board* v. *Retail Clerks International Association*, 243 F. 2d 777, 783 (C.A. 9). In *Mine, Mill and Smelter Workers* v. *Eagle-Picher Mining and Smelting Co.*, 325 U.S. 335, the charging parties were permitted to intervene in the court of appeals to support a petition by the Board to vacate a decree for back pay and to substitute another method; thus, they were able to seek certiorari even though the Board had not. However, as the Second Circuit pointed out here (R.-53, 20), "nothing indicates that anyone had resisted intervention in the court of appeals, * * * and the propriety of such intervention was not even considered in the briefs submitted to the Supreme Court, where the NLRB argued the merits precisely as if it had taken the appeal itself."

in this part of our brief why the distinction recognized by the courts—which reflects the consistent policy of the Board toward applications for intervention in judicial review proceedings—is sound, practical and fair and should be adopted by this Court, in the exercise of its supervisory authority over the procedure of the federal courts, to govern the courts of appeals in passing on such applications.

A. *Congress Established the Labor Board as the Exclusive Agency for Enforcing the Rights Created by the Act*

This Court, in *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, pointed out a fundamental distinction among federal administrative agencies. Some are empowered to award valuable privileges or franchises, or to provide a private administrative remedy for conduct injuring a person or group. Thus, a shipper who feels he is the victim of unjust discrimination by a railroad is entitled to institute a proceeding against the railroad before the Interstate Commerce Commission. 309 U.S. at 268-269. The agency in this kind of case acts essentially as a tribunal for vindicating private rights. *Ibid.* But in establishing other agencies, notably the Federal Trade Commission and the Labor Board, Congress determined that the goal of vindicating the public interest (which may be different from the private interests affected by agency action) should be paramount, and that therefore exclusive responsibility for administering the law should be placed in the agency, free of control or direction by interested

private persons. As the Court explained in *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 25-26:

> Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs. The formal complaint is brought in the Commission's name; the prosecution is wholly that of the Government; and it bears the entire expense of the prosecution. A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. He may of course bring the matter to the Commission's attention and request it to file a complaint. But a denial of his request is final. And if the request is granted and a proceeding is instituted, he does not become a party to it or have any control over it.

In *Amalgamated Utility Workers* v. *Consolidated Eidson Co.*, *supra*, the Court held that, despite some differences in detail, the statutory pattern under which the Labor Board operates also makes vindication of the public interest the overriding concern, so that, while private interests may be affected by Board action (or inaction), the Act creates no right to a private administrative remedy.[9] To the same effect,

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[9] The public nature of the Board's order is further shown by the fact that, even where it awards back pay to an employee found to have been discriminatorily discharged, creditors of the employee may not garnish or attach the money due under the order until it has actually been paid over to the employee involved and has become his private property. *National Labor*

see *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 362.

It follows that a right to intervene in a court proceeding to review Labor Board orders cannot properly be implied from the Act's design and purposes where permitting intervention would impede the Board in enforcing the Act in the public interest, even if a private interest would be advanced by permitting intervention. The holding of the *Amalgamated Utility Workers* case is controlling on this point. In that case, a labor organization had filed a charge with the Board against an employer, and the Board had entered a remedial order against him and obtained a court of appeals decree enforcing it. The original charging party later petitioned the court to adjudge the employer in contempt, alleging that he had disobeyed the decree. This Court held that such a petition was improper; that only the Board was empowered to institute proceedings for violation of the court's decree. To be sure, failure to institute such proceedings might result in depriving the charging party of such benefits as it may have derived from the existence of the order and decree. But this pri-

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Relations Board v. *Sunshine Mining Co.*, 125 F. 2d 757 (C.A. 9); *National Labor Relations Board* v. *Ozanne, Inc.*, 307 F. 2d 80 (C.A. 1). "The statute authorizes reparation orders not in the interest of the employee, but in the interest of the public." *Agwilines* v. *National Labor Relations Board*, 87 F. 2d 146, 151 (C.A. 5). (But cf. *Nathanson* v. *National Labor Relations Board*, 344 U.S. 25.) Monetary awards ordered by the Board "vindicate public, not private, rights." *Virginia Electric Co.* v. *National Labor Relations Board*, 319 U.S. 533, 543.

vate interest, the Court held, must be subordinated to the public interest, which required that the Board alone determine when and how to obtain compliance with its orders; the Board, for example, might believe that compliance could more readily be achieved through voluntary negotiations with the respondent than through institution of a contempt proceeding. Similarly, where permitting intervention in a judicial review proceeding would interfere with the Board's responsibility for administering the statute in the public interest, it should be denied even if a private party (whether the charging party, as in *Amalgamated*, or the respondent) is thereby denied a benefit or advantage he might be able to secure if he had the status of a party. Conversely, intervention should be allowed where it would facilitate the task of the Board in effectuating the statutory policy and objectives.

Petitioners attack the concept of the Labor Board as an agency exclusively for the vindication of the public interest in the prevention of unfair labor practices by pointing to certain features of the Board's procedures—having to do with the role of the charging party—which, they contend, are inconsistent with such a conception. (See petition for certiorari, No. 53, pp. 6-7.)

They point out, for example, that in Section 10(b) of the NLRA Congress made the filing of a charge with the Board a jurisdictional prerequisite to the issuance of a complaint. However, Sections 10(a) and (b) (see Appendix A, pp. 38-39, *infra*) make clear that the Board is not required, but

is merely "empowered," to act upon the charge. The charge is not a pleading and does not start a formal proceeding, but "merely sets in motion the machinery of an inquiry." *National Labor Relations Board* v. *Indiana and Michigan Electric Co.*, 318 U.S. 9, 18; *National Labor Relations Board* v. *Fant Milling Co.*, 360 U.S. 301, 307-308. If after investigation of the charge the General Counsel of the Board decides that there is not reasonable cause to believe that an unfair labor practice has been committed, or that a complaint would not be in the public interest, he may decline to issue a complaint, and his decision is not subject to judicial review. *E.g.*, *Hourihan* v. *National Labor Relations Board*, 201 F. 2d 187 (C.A. D.C.), certiorari denied, 345 U.S. 930; *Bandlow* v. *Rothman*, 278 F. 2d 866 (C.A. D.C.), certiorari denied, 364 U.S. 909. If he decides that a complaint is warranted, it issues in the name of the General Counsel of the Board, the government bears the entire expense of the prosecution, and control of the proceeding remains in the hands of the General Counsel. The charging party cannot enlarge the scope of the complaint issued by the General Counsel (*International Union of Electrical Workers* v. *National Labor Relations Board*, 289 F. 2d 757, 759-762 (C.A. D.C.); *Piasecki Aircraft Corp.* v. *National Labor Relations Board*, 280 F. 2d 575, 578-588 (C.A. 3), certiorari denied, 364 U.S. 933); and, after a complaint has issued, the General Counsel and the Board may, over the objection of the charging party and without affording him an evidentiary hearing, settle the case on a basis that pro-

vides a lesser remedy than might have been obtained after full litigation.[10]

The role of the charging party in initiating Labor Board proceedings is essentially the same as that of the informant whose complaint initiates FTC proceedings, as discussed in the *Klesner* opinion (see p. 14, *supra*). He proposes, but only the Board (or Commission) can dispose. Unlike the complainant in unjust-discrimination proceedings before the ICC (see p. 13, *supra*), neither the charging party nor the FTC informant can compel agency action on his complaint, since neither the Federal Trade Commission Act nor the National Labor Relations Act creates any right to a private administrative remedy.

Section 10(b) of the NLRA (p. 39, *infra*) provides that persons other than the respondent may be allowed to intervene in Board proceedings,[11] and the Board has adopted a regulation [12] giving the charging party the status of a "party" before it. Thus, should the Board dismiss the complaint, he would have standing under Section 10(f), as a person aggrieved, to seek judicial review of the Board's action. However, the charging

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[10] *Local 282, International Brotherhood of Teamsters* v. *National Labor Relations Board*, 339 F. 2d 795 (C.A. 2); *Textile Workers Union* v. *National Labor Relations Board*, 294 F. 2d 738, enforced after remand, 315 F. 2d 41 (C.A. D.C.); cf. *Marine Engineers' Beneficial Ass'n* v. *National Labor Relations Board*, 202 F. 2d 546 (C.A. 3), certiorari denied, 346 U.S. 819.

[11] Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), contains a similar provision.

[12] Section 102.8, Rules and Regulations and Statements of Procedure, 29 C.F.R. 102.8 (p. 42, *infra*).

party is permitted to participate at the hearing stage not to vindicate his private interest but to assist the General Counsel in protecting the public interest. Frequently the person most familiar with the evidence, his presence insures that the fullest possible record will be developed.[13] But control of the prosecution remains at all times in the hands of the General Counsel, acting in the public interest. Similarly, although the fact that the charging party is a party to the administrative proceeding means that, if the Board dismisses the complaint he can petition under Section 10(f) for court review of that action, this procedure, too, is intended to serve the public interest, not the private interest of the charging party. Where the charging party seeks court review of such dismissal action, he performs the important and salutary function of a "private attorney general." *Associated Industries* v. *Ickes*, 134 F. 2d 694, 704 (C.A. 2), vacated as moot, 320 U.S. 707; see *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, 14; *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 477. His petition to review provides the only means, in cases where the Board has not entered a remedial order, for correcting Board errors and insuring that

[13] For the same reason, Section 10(l) of the Act, which authorizes temporary injunctions against certain labor practices *pending completion of the Board proceeding*, provides for the participation of the charging party in the injunction action. A record has not yet been made, and the participation of the charging party may be helpful in the development of it.

the Board's interpretation of the statute is consistent with the intent of Congress.[14]

Save for the charging party's right as an aggrieved person to contest certain Board rulings, a procedure which as we have seen is required in order that the public interest be fully protected, the Act makes the Board's control over an unfair labor practice proceeding as complete after its order is entered as while the proceeding is still pending before it. If the Board finds that an unfair labor practice has been committed and issues a remedial order, only the Board may obtain enforcement of and compliance with that order. Section 10(e) of the Act empowers the Board to petition the appropriate court of appeals for enforcement of the order,[15] but does not require it to do so. Thus, if the respondent voluntarily complies with the order, or if the Board concludes that further proceedings would not be in the public interest, it has discretion not to proceed further; many cases are closed

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[14] The General Counsel of the Board is bound by the Board's decision dismissing the complaint, even if he considers it erroneous. See *Haleston Drug Stores* v. *National Labor Relations Board*, 187 F. 2d 418 (C.A. 9), certiorari denied, 342 U.S. 815.

[15] Section 10(e) reads:

> The Board shall have power to petition any court of appeals of the United States * * * for the enforcement of such order * * *.

See also Section 10(d), which provides:

> Until the record in a case shall have been filed in a court * * * the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

in this fashion. If after enforcement proceedings are instituted the Board concludes that further proceedings would not be in the public interest, again it may (with the court's approval) discontinue the proceeding. If the Board's order is enforced by a court decree, only the Board may institute contempt proceedings to insure compliance with the decree. *Amalgamated Utility Workers* v. *Consolidated Edison Company*, 309 U.S. 261; *Vapor Blast Independent Shop Worker's Ass'n* v. *Simon*, 305 F. 2d 717 (C.A. 7).

Thus the thrust of the NLRA, as of the Federal Trade Commission Act, is to place sole responsibility for enforcement of the law in the hands of a public agency charged to act solely in the public interest, rather than to secure or protect such benefits as may accrue to the charging party from a Board proceeding or order, or a decree of enforcement. The role of the charging party in the administration of the Act is strictly limited to those instances where his participation promotes enforcement of the law in the public interest, as by filing charges, participating as a party in the proceeding before the Board, and appealing Board orders that deny adequate relief.

B. ***Permitting the Successful Respondent to Intervene Is Entirely Consistent With the Labor Board's Exclusive Authority to Enforce the NLRA; Moreover, It Is Supported by Considerations of Fairness.***

Intervention in judicial review proceedings by successful respondents is not likely to impair the Board's effective discharge of its duty to enforce the law in

the public interest; it may even promote it. In the first place, there is little danger that such intervention would unduly delay or hinder the proceeding. To be sure, according the respondent before the Board the status of a party to the review proceeding would permit him to participate in the designation of the record for printing, to file a brief, to present oral argument, and to petition for certiorari in the event of an adverse decision. See *Mine, Mill and Smelter Workers* v. *Eagle-Picher Mining and Smelting Co.*, 325 U.S. 335, 338-339. However, records in Board cases usually are relatively short, and it is not likely that the respondent would add substantially to the other parties' designations; even if intervention were denied, the respondent would probably be permitted to file a brief as *amicus curiae* (see R.-18, 8); and permitting the respondent to present oral argument does not necessarily enlarge the total time for argument, for unless the court grants additional time, parties on the same side are usually required to divide the time allocated to that side. See C.A. 7, Rule 21(b); C.A. 2, Rule 23(c). Even more important, since the judicial review proceeding is appellate, intervention does not carry the same potentiality for protraction and complication as in a trial court proceeding in which the intervenor presents testimony, cross-examines witnesses, and makes motions.

Finally, the fact that the successful respondent could seek review in this Court when the Board decided to acquiesce in a court of appeals adverse decision has little practical significance for the Board's control of unfair labor practice litigation. Even if

respondent could not seek certiorari from the first decision of the court of appeals, he could do so later, after an order had been issued against him. A decision of the reviewing court reversing a Board order dismissing a complaint does not terminate the case. The case is returned to the Board for further proceedings, which normally result in entry of a second order. If as is usually the case (see p. 24, *infra*) the second order is affirmed by the reviewing court, the respondent is then entitled to seek review in this Court. Thus, whether or not a successful respondent is permitted to intervene in the first judicial review proceeding affects only the time at which he may file a petition for certiorari.

Permitting such intervention not only does not retard, but indeed advances, the objectives of the NLRA, by accelerating final resolution of the controversy. If intervention is permitted, and the court reverses the Board's order dismissing the complaint, respondent does not have to wait for a subsequent proceeding before deciding to seek further review, but can make that decision at the conclusion of the first review proceeding. If respondent decides to acquiesce in the court's ruling, or if he rejects the ruling but this Court denies his petition for certiorari, it is likely he will then stipulate to the entry of an order against him, thereby obviating the need for lengthy supplemental Board and court proceedings. Permitting the successful respondent to intervene thus furthers one of the Act's basic objectives, the prompt resolution of labor disputes.

There is also a question of fairness to the respondent. If intervention by the successful respondent were not allowed, then in the event that the Board's order dismissing the complaint was set aside and the Board decided not to contest the court's action further, he would have to overcome a substantial obstacle in any subsequent review proceeding. The first court decision, though not legally binding upon respondent, is likely as a matter of *stare decisis* or comity to be followed in any subsequent proceeding to review the Board's post-remand order against him. For example, No. 18 involves only the legal issue whether a fine imposed by a union against its members for violating union rules constitutes restraint and coercion within the meaning of Section 8(b)(1)(A) of the Act. If the court of appeals concluded, contrary to the Board, that such a fine was barred by the section, and the Board acquiesced in that ruling, the Board would accept the court's remand and proceed to enter an order against the union requiring it to cease and desist from levying the fine. The union would have an opportunity to contest this order in a subsequent proceeding brought under Section 10(e) or (f) of the Act, but, as a practical matter, would be limited to urging the court to reconsider its prior views of the reach of Section 8(b)(1)(A).[16] To be sure, if the

[16] This is not always so, for courts of appeals sometimes remand proceedings to the Board to take additional evidence or to reconsider its decision in the light of new principles enunciated by the court. In those circumstances, there is a greater opportunity for the respondent to resist the entry of a subsequent order against him. See, *e.g.*, *Greco* v. *National*

court of appeals adhered to its earlier conclusion and enforced the new order which the Board entered against the union, the latter could petition this Court for certiorari. But such review is, of course, purely discretionary with the Court; and in any event the union would not have had the opportunity normally afforded a litigant to present his position to the court of first resort before its views have crystallized. But see *Insurance Agents'* v. *National Labor Relations Board*, 260 F. 2d 736 (C.A. D.C.).[17]

C. *Permitting the Successful Charging Party to Intervene Would Seriously Interfere With the Efforts of the Board to Enforce the NLRA in the Public Interest.*

The situation presented in No. 53, that of the successful charging party, requires a different conclusion

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Labor Relations Board, 331 F. 2d 165 (C.A. 3); *Int'l Ladies' Garment Workers' Union* v. *National Labor Relations Board*, 339 F. 2d 116 (C.A. 2); *Local 152, Teamsters* v. *National Labor Relations Board*, 58 LRRM 2285 (C.A. D.C.).

[17] The analysis whereby we conclude that the successful respondent should be permitted to intervene is supported by the analogy of Rule 24(b) of the Federal Rules of Civil Procedure (permissive intervention), which provides in part that "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." In applying this provision, the court balances the inconvenience and delay which will follow if intervention is granted against the harm to the person seeking intervention if it is denied. *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137, 142; *Crosby Steam Gage & Valve Co.* v. *Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972 (D. Mass.); 4 Moore, *Federal Practice*, Par. 24.10 (2d ed., 1963). Cf. 3 Davis, *Administrative Law Treatise*, § 22.08, p. 241 (1958).

from that urged above for No. 18, the case of the successful respondent. In No. 53 the Board, upon charges filed by the union (petitioner in this Court), found that the employer had refused to bargain, in violation of Section 8(a)(5) of the Act, and entered a remedial order. The employer petitioned to review this order; the Board cross-petitioned to enforce it; and the union sought to intervene in the proceeding to help the Board secure enforcement. Denying intervention in this situation creates no danger that, in the event the Board's order is reversed, the applicant for intervention will find it difficult to resist entry of a remedial order against him, as in the case where the successful respondent, rather than the successful charging party, is the applicant. To be sure, the successful charging party may lose whatever benefit he might derive from the existence of a remedial order against the respondent. But it is not the function of Labor Board proceedings to confer, as such, benefits on private parties. As the Second Circuit pointed out (R.-53, 18-19): "Normally a charging party has no 'claim' of any sort apart from that which the Board elects to bring on his behalf * * *. However deeply he may be concerned with the outcome of the Board's proceeding, *Amalgamated Util. Workers* v. *Consolidated Edison Co.*, 309 U.S. 261 (1940), holds that he does not have any legal 'interest' since the purpose of the Labor Act is simply to enforce public rights."

The interest of the charging party in securing enforcement of a remedial order against the respondent (which is not an interest protected by the Act) must

yield to the Act's overriding goal of enforcement exclusively in the public interest. The consequences of permitting the successful charging party to intervene in the review proceeding (rather than confining him to the status of *amicus curiae* (see R.-53, 22)) would be two: to enable him to petition for certiorari in the event that the court of appeals' decision was adverse and the Board decided not to seek further review; and to block the Board and the respondent from discontinuing the court of appeals proceeding prior to the court's decision without the charging party's consent. These consequences would subvert the public character and objectives of Labor Board litigation.

The design of the Act is to make the public interest controlling at every stage of an unfair labor practice proceeding. Thus, as we have seen, the General Counsel is not required to proceed on a charge; if he does, either he or the Board may thereafter discontinue the proceeding even over the opposition of the charging party; should the Board issue an unfair labor practice order, it may decide not to seek enforcement thereof; and even if it does and obtains an enforcement decree, it alone decides what steps should be taken to secure compliance with that decree. The reasoning that sustains the agency's broad discretion in these instances also leads to the conclusion that the Board, without limitation by the charging party, should be empowered to withdraw a case from the court of appeals or to decline to seek certiorari from an adverse decision. While "the energy already spent and the disharmony promoted are beyond recall, the

public interest as viewed by the Board may yet dictate that the conflict proceed no further; and *Amalgamated Util. Workers*, which was itself concerned with post-decision rights of the charging party, makes the public interest controlling" (R.-53, 21).

To illustrate, suppose that after the Board has filed an enforcement petition the respondent decides voluntarily to comply with the Board's order, and the Board, weighing the likelihood of a repetition of the illegal conduct against the time and expense of litigating to obtain a formal court decree and the prospects of losing, concludes that it would effectuate the policies of the Act to accept the settlement and withdraw the petition to enforce; if the charging party was a party to the court proceeding and opposed this course, he could conceivably force a continuation of the proceeding. Cf. 28 U.S.C. 2323; 5 U.S.C. 1038. Or suppose that after the Board has filed a petition to enforce its order, this Court enters a decision in another case which the Board believes casts doubt upon the validity of the principle applied in the enforcement case, or at least suggests that it would be advisable for the Board to obtain additional evidence and make additional findings; if the charging party was a party to the enforcement proceeding and disagreed as to the effect of the intervening decision, it is possible that he could defeat the Board's efforts to obtain a remand and thus force the litigation to continue in a posture which the Board deemed unfavorable. Or suppose that the Board obtains an adverse ruling in the enforcement case and decides not to seek certiorari because the issue, although important, is

not presented in a good factual setting; if the charging party was a party to the proceeding, he would be able to seek certiorari nonetheless, and, if certiorari was granted, the Board would be forced to defend its position in what it regarded as an unsuitable vehicle.[18]

As these examples show, the public interest in the effective prevention of unfair labor practices and the prompt and harmonious settlement of labor disputes may, when a decision must be made on whether to compromise a proceeding pending in the court of appeals, or on whether to seek review in this Court of an adverse court of appeals decision, diverge from the private interest of the charging party, which is simply to secure the maximum remedial order against the respondent. To permit the charging party to intervene in the judicial review proceeding would mean that he could block settlements between the Board and respondents fairly designed to end a labor dispute immediately, without further litigation, and on terms

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[18] The fact that the Board itself had not petitioned for certiorari might, of course, make it more difficult for the charging party to obtain further review. But the Board's failure would not necessarily insure the defeat of the charging party's petition. For, by hypothesis, the issue presented would be important and the Board would be in agreement with the legal position asserted by the charging party. It would therefore be difficult for the Board flatly to oppose his petition.

As pointed out pp. 22-23, *supra*, permitting the respondent to intervene in the situation presented in No. 18 does not entail any diminution of the Board's control over the power to petition for certiorari. For the respondent would in any event be able to seek certiorari with respect to the order issued against him following the first court proceeding.

fully adequate to protect the public interest. It would mean that the charging party could seek review in this Court under circumstances where the risk of an unfavorable decision was unnecessarily great. It would mean, in short, that a private party would be able to substitute his discretion for that of the Board in a range of crucial strategic decisions with respect to the administration of the NLRA, diverting the course of Labor Board cases in their appellate stages for his private gain. Not only is such a result manifestly inconsistent with the design of the Act, and contrary to *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261; it would create a very substantial practical problem, since the Board has by far the heaviest burden in judicial review proceedings of any federal administrative agency.[19]

Petitioner in No. 53 argues that to deny the successful charging party the right to intervene in the judicial review proceeding would be anomalous, since if the Board had ordered the complaint dismissed, the

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[19] In 1964, the Board participated in 416 appellate review proceedings. The combined total of such proceedings for all of the other federal boards and commissions was 567 (almost half of this total being accounted for by Tax Court matters). *1964 Annual Report of The Administrative Office of the United States Courts*, 208. See Appendix B, *infra*, tabulating the appellate workloads of the various agencies. More than 90 percent of the appeals from Board orders involve remedial (rather than dismissal) orders. This is some indication of the practical significance of permitting intervention by successful charging parties in court of appeals review proceedings. In addition, permitting such intervention could well result in substantially increasing this Court's already very substantial burden of petitions for certiorari in Labor Board matters.

charging party would have been entitled to appeal the Board's order (Pet. 5-6). There is no anomaly. If the complaint is dismissed, giving the charging party a right to appeal is the only way to insure that the legal soundness of the Board's action can be reviewed by a court. But if the Board enters a remedial order, it may petition the court to enforce the order, or the respondent may appeal the order or, by refusing to comply with it, compel the Board to seek enforcement. Moreover, the provision that the charging party may appeal if the Board fails to order adequate relief serves the salutary function of compelling the Board to enforce the Act vigorously. But there is no need for a "private attorney general" (see p. 19, *supra*) where—as in the case of the successful charging party who seeks to intervene in the court of appeals in order to help defend (rather than contest) the Board's order—the Board has *not* failed to issue an adequate remedial order. By hypothesis in the situation presented in No. 53, the Board *has* issued such an order. It has thereby evinced a determination to enforce the law vigorously. Surely the Board in such a case can be depended on to take all steps consistent with the public interest to assure that its own order becomes final and effective, and is not set aside or abandoned.[20]

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[20] Similarly, there is no anomaly in denying the charging party the status of party in the judicial review proceeding, while—as the Board does—giving him such status in the administrative proceeding. The fact that persons may be parties to the administrative proceeding does not automatically

Petitioner also argues that, where a court of appeals that denies intervention to a successful charging party reverses the Board's remedial order, the subsequent Board order dismissing the complaint pursuant to the court's mandate is appealable by the charging party, and hence that intervention should be allowed in the first judicial review proceeding to prevent disorderly and redundant judicial review (petition for certiorari, No. 53, p. 9). The premise of this argument is incorrect. The rationale of permitting the charging party to appeal a Board order dismissing the complaint is that otherwise there is no way to test the validity of the order in a court of appeals. That rationale fails completely where the order dismissing the complaint is pursuant to a court of appeals' mandate following its review of the Board's remedial order. Section 10(f) of the Act surely would not be interpreted to permit an appeal by the charging party in these circumstances. So clear is this that

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make them parties to the judicial review proceeding. See *Amalgamated Meat Cutters* v. *National Labor Relations Board*, 267 F. 2d 169, 170 (C.A. 1), certiorari denied, 361 U.S. 863; *Algonquin Gas Transmission Co.* v. *Federal Power Commission*, 201 F. 2d 334, 342 (C.A. 1). A review or enforcement proceeding under Sections 10(f) and (e) of the Act is not the equivalent of an appeal of the entire Board proceeding. Section 10(f) restricts the review proceeding to a controversy between the Board and the person aggrieved by its order. Similarly, Section 10(e) restricts the enforcement proceeding to a controversy between the Board and the person against whom its order is directed. There are also practical reasons which justify permitting the charging party to intervene before the agency but which are not applicable in judicial review proceedings. See pp. 8-9, 19-20, *supra*.

we know of no case in which a charging party has ever attempted to appeal from a Board order dismissing the complaint pursuant to the reviewing court's mandate.

Finally, the Second Circuit (R.-18, 19, n. 1) noted that "A different case might—or might not—be presented when the charging person has a contractual claim which he submits initially to the Board because it may also involve an unfair labor practice." Petitioner in No. 53 claims for the first time in this Court that "there is the most direct relationship between the unfair labor practice issue under review in the court below and the Union's contractual rights" (petition for certiorari, No. 53, p. 8, n. 3). We think this Court should not consider the issues involved in petitioner's belated claim that the judicial review proceeding might determine its rights under the contract, since this claim was not made in petitioner's petition for intervention (R.-18, 9-13) or considered by the Second Circuit. In any event, that facts supporting an unfair labor practice charge may also support a private contract claim lends no support to the position that the charging party should be permitted to intervene in the unfair labor practice proceeding. The charging party's private contract claim would not be foreclosed by a court of appeals decision ordering the unfair labor practice complaint dismissed, any more than a complaining party in an FTC proceeding would be foreclosed in the assertion of a private tort claim by a court of appeals decision finding that no violation of the FTC Act had been committed. While

there is an overlapping between conduct subject to the Board's jurisdiction and that which is actionable in the courts by virtue of Section 301 of the Labor Management Relations Act (*Smith* v. *Evening News Assn.*, 371 U.S. 195), the rights and remedies under these two bodies of law remain distinct. Certainly conduct could violate a collective bargaining contract and be actionable under Section 301 although it was found not to violate the NLRA.

III

Intervention in Judicial Review Proceedings of Other Federal Agencies Involves Different Factors and Considerations; A Rule Uniformly Applicable to All of the Agencies Would Not Be Appropriate.

In Appendix C, *infra*, we summarize the practice of other federal agencies with respect to intervention in judicial review proceedings by persons not aggrieved by the agency's order. The practice of some agencies, unlike the Labor Board, is governed by specific statutory provisions on intervention. Other agencies have, like the Labor Board, derived their practice on intervention not from a specific provision of the statute they administer but from the design and purpose of the statute as a whole. In either case, no agency supports intervention by the charging party in proceedings that involve prosecutions for past violations of a statutory provision, where the agency acts only to vindicate public rights. Thus, under the Federal Trade Commission Act—the closest parallel to, and the model for, the NLRA (see *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 268-269, and pp. 13-14, *supra*), it has never

been suggested that the complainant to the agency has a right to intervene in a proceeding to review the Commission's order.

Other agencies have consented to intervention by persons in an analogous position to the successful charging party before the Labor Board, but only in proceedings that cannot be characterized as exclusively intended to vindicate a public interest—proceedings to set future rates, or grant or deny valuable privileges or franchises, or to vindicate private rights (as under the Interstate Commerce Act; see p. 13, *supra*). In some cases, the intervenor in such proceedings seeks to uphold agency action that gives him a direct economic benefit (*e.g.*, a rate reduction or an award of a license or certificate). In other cases (*e.g.*, where he has opposed a rate increase or the grant of a license or certificate to another), the intervenor stands to pay higher rates or to lose a competitive advantage if the agency action is reversed. The protection of these private interests may well justify a more liberal intervention policy than would be warranted under the National Labor Relations Act, which is not designed to protect such interests. The practices of other agencies with respect to intervention should not be controlling here for the additional reason that the other agencies have many fewer appellate proceedings (see n. 19, p. 30 *supra*, and Appendix B, *infra*). To an agency that has only, say, a dozen such proceedings every year (instead of more than 400, as in the case of the Labor Board), the question whether to permit intervention by an interested but not aggrieved

person may have little practical importance, and in consequence the agency may not have focused on the legal and policy questions involved in applications for intervention by such persons. But, we have seen, this is a question of substantial practical significance to the Labor Board.

We believe that the differences in the mandates (and also in the volume) of appellate litigation by the federal administrative agencies are too great to justify the Court either in looking to the practices of other agencies as the basis for formulating a rule to guide intervention in judicial review proceedings in Labor Board cases, or in formulating a uniform rule to guide intervention in judicial review proceedings in all federal administrative matters. This is an area where diversity of practice is proper and unavoidable.

CONCLUSION

The judgment in No. 18 should be reversed, and that in No. 53 should be affirmed.

Respectfully submitted.

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AUGUST 1965

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*) are as follows:

Sec. 3. * * *

* * * *

(d) There shall be a General Counsel of the Board, who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. * * *

* * * *

Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon

such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

* * * *

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional

evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. * * * Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part of relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to

make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

The relevant provisions of the National Labor Relations Board Rules and Regulations and Statements of Procedure (29 CFR 102.—), are as follows:

Sec. 102.8 *Party.*—The term "party" as used herein shall mean the regional director in whose region the proceeding is pending and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act, and any labor organization alleged to be dominated, assisted, or supported in violation of section 8(a)(1) or 8(a)(2) of the act; but nothing herein shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only.

Sec. 102.9 *Who may file; withdrawal and dismissal.*—A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person. Any such charge may be withdrawn, prior to the hearing, only with the consent of the regional director with whom such charge was filed; at the hearing and until the case has been transferred to the Board pursuant to section

102.45, upon motion, with the consent of the trial examiner designated to conduct the hearing; and after the case has been transferred to the Board pursuant to section 102.45, upon motion, with the consent of the Board. Upon withdrawal of any charge, any complaint based thereon shall be dismissed by the regional director issuing the complaint, the trial examiner designated to conduct the hearing, or the Board.

APPENDIX B

LITIGATION INITIATED IN THE COURTS OF APPEALS BY BOARDS AND COMMISSIONS [1]

	Fiscal Years						
	1958	1959	1960	1961	1962	1963	1964
Boards and Commissions, Total	625	606	737	846	1,024	1,141	983
Tax Court of the U. S.	253	204	203	218	236	363	264
Civil Aeronautics Board	9	23	20	23	34	30	23
Federal Communications	53	35	34	34	33	70	40
Federal Power Commission	31	39	62	42	90	59	56
Federal Trade Commission	21	22	29	29	29	49	49
NLRB	222	254	348	425	418	445	416
Secretary of Agriculture	4	3	4	2	5	1	3
Securities and Exchange	10	8	10	15	4	14	7
Board of Tax Appeals (D.C.)	10	6	2	3	11	7	21
Immigration and Naturalization	—	—	—	—	105	36	40
All Other Boards and Commissions	12	12	25	55	59	67	64

[1] The Annual Report of the Director of the Administrative Office of the U. S. Courts, Fiscal Year 1964.

APPENDIX C

1. Agencies which have specific statutory provisions respecting intervention in judicial review proceedings

Most cases involving judicial review of orders of the Federal Communications Commission are brought under Section 402(b) of the Communications Act of 1934, 47 U.S.C. 402(b), which, *inter alia*, permits any person whose application for a construction permit or station license has been denied by the Commission to appeal to the court of appeals. Section 402(e), 47 U.S.C. 402(e), provides that "any interested person" may intervene in that proceeding, and that "Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party." The Commission has interpreted Section 402(e) as providing for intervention only by persons who would be aggrieved by a reversal or modification of the Commission's order, and this usually would be the person receiving the license grant that the appellant is seeking to upset. Accordingly, the Commission has not opposed intervention by such persons even though they are "on the Commission's side." However, it has successfully opposed the efforts of persons claiming aggrievement from the Commission's order to intervene in a review proceeding brought by another aggrieved person, on the ground that they have standing to file their own petition to review the Commission's order.

Review of other Commission orders — generally, those entered in rule-making proceedings—is governed by the provisions of the Judicial Review Act of 1950 (the Hobbs Act), 5 U.S.C. 1031-1042. This Act also governs (see 5 U.S.C. 1032) the review of

orders by the Secretary of Agriculture under the Packers and Stockyard Act, 1921, and the Perishable Agricultural Commodities Act, 1930; by the Federal Maritime Commission under the Shipping Act, 1916 and the Intercoastal Shipping Act, 1933; and by the Atomic Energy Commission under the Atomic Energy Act of 1954. Section 4 of the Hobbs Act (5 U.S.C. 1034) provides that "Any party aggrieved by a final order" may "petition to review such order." And, Section 8 (5 U.S.C. 1038) provides:

> * * * The agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review such order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the agency's order, may intervene in any proceeding to review such order. The Attorney General shall not dispose of or discontinue said proceeding to review over the objection of such party or intervenors aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said proceeding unaffected by the action or nonaction of the Attorney General therein.

Under this broad provision, both the successful party before the agency and any party aggrieved by its action would be entitled to intervene in the review proceeding, and the agencies involved have not opposed such intervention. See *Producers Livestock Marketing Ass'n* v. *United States*, 241 F. 2d 192, 194 (C.A. 10), affirmed, *sub nom. Denver Stock Yard* v. *Livestock Ass'n*, 356 U.S. 282.

Intervention in proceedings to review orders of the Interstate Commerce Commission are governed by a comparable statutory provision, 28 U.S.C. 2323. Accordingly, the Commission has consistently taken the position that any party in interest in the proceeding before the Commission is entitled to intervene in a judicial review proceeding, as either a party plaintiff or a party defendant. See *Railroad Trainmen* v. *Baltimore & Ohio Railroad Co.*, 331 U.S. 519.

Judicial review of orders of the Civil Aeronautics Board is governed by the Federal Aviation Act of 1958, 49 U.S.C. 1301, which permits "any person disclosing a substantial interest in such order" to petition for review in the court of appeals (49 U.S.C. 1486). That Act further provides (49 U.S.C. 1489) that in such proceeding:

> * * * it shall be lawful to include as parties, or to permit the intervention of, all persons interested in or affected by the matter under consideration * * *.

The Civil Aeronautics Board has therefore not opposed the intervention of persons who have benefited from the Board's order, provided they had a sufficient interest to and did intervene in the administrative proceeding, *e.g.*, competitors of a carrier to whom a route has been denied. See Memorandum for the Civil Aeronautics Board, *In the Matter of the Petition of Eastern Air Lines, Inc.*, Nos. 720, 766, October Term, 1963. Cf. *Western Air Lines, Inc.* v. *Civil Aeronautics Board*, 190 F. 2d 340 (C.A. 9). However, the Board has successfully opposed applications for intervention on the part of persons aggrieved by its order, on the ground that intervention should not be substituted for a petition for review.

2. Agencies whose statute is silent respecting intervention in court review proceedings

Under the statutes administered by the Federal Power Commission—the Federal Power Act and the Natural Gas Act—a person "aggrieved" by a final order may institute a court review proceeding, provided he has first made, and the Commission has denied, a timely application for rehearing. 16 U.S.C. 825*l*(b); 15 U.S.C. 717r(b). The statutes are silent on the question of what other parties may intervene in the review proceeding. The Commission usually consents to petitions to intervene by persons other than the person aggrieved by its order, if they were parties to the proceeding before the Commission, and the courts have generally granted intervention. But see *Algonquin Gas Transmission Co.* v. *Federal Power Commission*, 201 F. 2d 334, 342 (C.A. 1).

Under the Mineral Leasing Act (30 U.S.C. 226), the Secretary of the Interior is authorized to grant oil and gas leases on public lands. Judicial review of his decision is obtained by a mandamus action in the district court brought against the Secretary by an unsuccessful applicant or the party whose mining entry has been declared invalid. The applicant for intervention is usually the successful party who obtained the lease or mining claim. The government has taken a neutral position with respect to his right to intervene, and the courts, applying Rule 24 of the Federal Rules of Civil Procedure, have generally permitted intervention. See *Wright* v. *Paine*, 289 F. 2d 766, 767, n. 1 (C.A. D.C.).

Under the Bank Holding Company Act (12 U.S.C. 1841), the Federal Reserve Board is authorized to approve applications for the formation of a holding company to acquire the stock of a bank. The statute

permits the "party aggrieved" by the Board's action to petition the court of appeals for review of the Board's order (12 U.S.C. 1848), but contains no provision respecting intervention by other persons. The aggrieved party is usually a competitor of the bank whose application the Board approved. Where an aggrieved party petitions for review and the successful applicant seeks to intervene in the court proceeding, the Board has not opposed such intervention and it has been granted.

Under the Public Utility Holding Company Act (15 U.S.C. 79b), the Securities and Exchange Commission is empowered to determine whether a company is a holding company within the meaning of the Act and thus subject to its registration requirements and security restrictions (see 15 U.S.C. 79b(7)). Any person aggrieved by an order issued by the Commission may obtain review of such order in the court of appeals (15 U.S.C. 79x).* See *American Power Co.* v. *Securities and Exchange Commission*, 325 U.S. 385. The statute is silent on the question whether other persons may intervene in the proceeding. The Commission has never opposed intervention by any participant before the Commission.**

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* There are comparable review provisions under the Securities Act of 1933 (15 USC 77a), the Securities Act of 1934 (15 U.S.C. 78y), and the Investment Company Act of 1940 (15 U.S.C. 80a-42).

** Proceedings to enforce its order or to enjoin violations of the statute are brought by the Commission in the district court (15 U.S.C. 79y), where Rule 24 of the Federal Rules of Civil Procedure would govern intervention. The Commission determines its position on intervention in these proceedings on a case-by-case basis.

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